Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

STATE OF MISSOURI, UPON THE INFORMATION OF ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI, A MUNICIPAL CORPORATION,
PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A DELAWARE CORPORATION,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in State of Missouri, upon the Information of Roy McKittrick, Attorney General of the State of Missouri, at the Rela-

tion of the City of Trenton, Missouri, a Municipal Corporation, Relator, vs. Missouri Public Service Corporation, a Corporation, Respondent, is reported in 174 S. W. 2d 871 (not yet reported in the official reports).

II.

Statement As to Jurisdiction.

The Petitioner, in support of the jurisdiction of the Court to review the above cause on Writ of Certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of the Court is based upon the Judicial Code, Section 237, as last amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Sec. 344 and particularly Section 344 (b) thereof), which provides in part as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, * * *."

B.

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered on July 20, 1943 (R. ___). Petition for Rehearing was duly filed July 29, 1943 (R. ___). On November 1, 1943, Motion for Rehearing was denied (R.

____). This case was decided by the Supreme Court of Missouri, *en banc*, and is a final judgment, adverse to Petitioner, rendered by the highest court of Missouri.

State ex rel. McGrew Coal Co. v. *Ragland*, 339 Mo. 452, 97 S. W. 2d 113.

Mower v. *Fletcher*, 114 U. S. 127, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799.

Gorman v. *Washington University*, 316 U. S. 98, 86 L. Ed. 1300, 62 Sup. Ct. Rep. 962.

C.

Nature of Case and Ruling Below.

The instant case is the last of approximately nine suits, between these parties involving the construction by Petitioner of a municipal electric plant and the right of Respondent to maintain and operate an electric plant in the City of Trenton, Missouri. The instant case was instituted directly in the Supreme Court of Missouri by Roy McKittrick as Attorney General of Missouri, against the Respondent, on June 8, 1938, to oust Respondent by way of Quo Warranto. The object was to require Respondent to remove its poles, wires and other equipment from the public streets, avenues and alleys of the City of Trenton, it being contended that Respondent owned such equipment and was operating an electric generating and distribution system in the City of Trenton without any right, franchise or privilege granted to the City of Trenton authorizing it to do so.

After some preliminary proceedings, Respondent answered the petition, alleging its ownership and operation of the electric system and contending it was the owner and successor in title to the Jones Franchise granted July 22, 1886, that this was a perpetual franchise and that if Respondent had no franchise, Relator was estopped

to deny Respondent possessed a franchise for a perpetual term.

Petitioner replied, denying the allegations of the answer, and alleged the invalidity of the Jones Franchise was decided by the U. S. Courts in litigation between the parties, that the City of Trenton had no authority to grant an electric franchise, that Respondent had never operated under the Jones Franchise, that Respondent could not be injured by the ouster, because it had made such large and excessive profits out of the operation that it was fully compensated for the investment it had made.

A Special Commissioner, Hon. Edgar J. Keating, a member of the Kansas City, Missouri, Bar, was appointed to hear the evidence and make his report to the Court. He made his report December 6, 1940, and found that the Respondent possessed no franchise to maintain and operate an electric plant in Trenton, and that the Relator was not estopped to deny that Respondent had a Franchise, recommending the ouster of Respondent.

Shortly thereafter, the case was argued and submitted to the Supreme Court of Missouri, *en banc*, which court, more than two years after submission, handed down its decision, rejecting the findings and report of the Special Commissioner and denying the ouster.

The Supreme Court of Missouri held that the litigation in the Federal Courts between the parties did not determine the issue of the validity of the Jones Franchise, notwithstanding Petitioner's contention that such ruling violated the full faith and credit clause of the Federal Constitution. It also ruled that the City of Trenton possessed charter authority to grant the Jones electric Franchise, notwithstanding Petitioner's contention that under long established law such charter authority must be strictly construed and to do otherwise violated the

obligation of contract and due process clauses of the Federal Constitution. By a most liberal construction of the franchise ordinance, the Court (1) construed the ordinance to grant a perpetual electric franchise, which could be exercised by Respondent at any time, (2) denied that (if a franchise was so granted) it had not been forfeited by the self-operating forfeiture clause (Sec. 6) of the Franchise ordinance, (3) determined, in the face of the Special Commissioner's finding (and all the evidence in the record), that Respondent operated under the Jones Franchise from the date (1897) of the purchase of the gas plant and Jones Franchise by the owners of the Bailey Franchise, (4) entirely ignored the statutory adoption of the common law (Section 645, Revised Statutes of Missouri, 1939) and the established law of Missouri, providing that franchises are to be strictly construed and whatever is not unequivocally granted is withheld, notwithstanding Petitioner's contentions that such construction rendered the franchise void; that the established law of Missouri required such franchise to be strictly construed in favor of the grantor; that such law became a part and parcel of the Franchise agreement itself; that the Supreme Court of Missouri by its decision had completely departed from all established law applicable to the case and ignored the law which was a part of the contract itself and thereby impaired the obligation of Relator's Contract with Respondent and deprived Relator of the due process of law, in violation of Section 10, Article I, and the V and XIV Amendments to the Constitution of the United States.

D.

Cases Believed to Sustain Jurisdiction.

This Court has jurisdiction to review any decision wherein the protection of Section 1 of Article IV, Sec-

tion 10, Article I, and the V and XIV Amendments to the Constitution of the United States are sought to preserve the rights of a litigant.

Chicago, Burlington and Quincy Railroad Company v. *City of Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.

Betts v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. Rep. 1252.

Muhlker v. *New York & Harlem Railroad Company*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522.

III.

Statement of the Case.

In the interest of brevity, Petitioner does not here make a statement of the case, since a full statement has been given under heading "A" in the Petition for Writ of Certiorari.

IV.

Specification of Errors.

1. The Court erred in failing to hold that the decisions of the Federal Courts between the parties determined the Jones Franchise to be invalid and in failing to give full faith and credit to such decisions, contrary to Section 1, Article IV of the Constitution of the United States.

2. The Court ered in failing to hold that the adoption of the common law and decisions of Missouri appellate courts became a part of the franchise agreement in this case and that accordingly, such franchise agreement should be strictly construed against Respondent and

that such failure impaired the obligation of the franchise contract between Petitioner and Respondent, contrary to Section 10, Article I of the Constitution of the United States.

3. The Court erred in failing to hold that the adoption of the common law and decisions of Missouri appellate courts became a part of the franchise agreement in this case and that accordingly, such franchise agreement should be strictly construed against Respondent and that such failure deprived Petitioner of due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

4. The Court erred in failing to hold that the adoption of the common law and decisions of the Appellate Courts required a strict construction of the Charter of the City of Trenton, Missouri, and in failing to apply this well established principle, deprived Petitioner of due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

5. The Court erred in its decision and judgment so totally and patently to recognize the applicable statutes and many decisions of Missouri, requiring a decision and judgment in Relator's favor so as to deprive Petitioner of its property without due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

V.

Summary of Argument.

A.

United States Courts in litigation between parties to this proceeding determined the Jones Franchise invalid. The failure of the Supreme Court of Missouri to recog-

nize this determination by the Federal Courts violated the full faith and credit clause, Section 1, Article IV of the Constitution of the United States.

Missouri Public Service Corporation v. *Fairbanks, Morse & Co. and the City of Trenton et al.*, 19 Fed. Supp. 45, 95 F. 2d 1.

Russell v. *Russell*, 134 Fed. 840.

Simmonds v. *Norwich Union Indemnity Company*, 73 F. 2d 412.

Southern Pacific R. R. Co. v. *United States*, 168 U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18.

Baker v. *Cummings*, 181 U. S. 117, 45 L. Ed. 776, 21 Sup. Ct. Rep. 578.

15 Ruling Case Law 927, Section 405.

Supreme Lodge K. P. v. *Meyer*, 265 U. S. 30, 68 L. Ed. 885, 44 Sup. Ct. Rep. 432.

B.

The decision of the Supreme Court of Missouri impairs the obligation of Petitioner's franchise contract with the Respondent contrary to Section 10, Article I of the Constitution of the United States, and deprives Petitioner of property without due process of law, contrary to the provisions of the V and XIV Amendments to the Constitution of the United States.

Section 645, Revised Statutes of Missouri, 1939.

Blackstone, Part II, page 347.

Stourbridge Canal Company v. *Wheeley*, 2 Barnewal and Adolphus 791, 109 Eng. Rep. full reprint 1336.

St. Louis Gas Light Company v. *St. Louis Gas, Fuel and Power Company*, 16 Mo. App. 52.

Carroll v. *Campbell*, 108 Mo. 550, 17 S. W. 884.

State ex rel. Laclede Gas Light Company v. *Murphy*, 130 Mo. 10, 31 S. W. 594, affirmed, 170 U. S. 78, 42 L. Ed. 955, 18 Sup. Ct. Rep. 505.

Fanning v. *Gregoire*, 16 How. 524, 14 L. Ed. 1043.

Memphis Electric Light, Heat and Power Company v. *City of Memphis*, 271 Mo. 488, 196 S. W. 1113.

Blair v. *City of Chicago*, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427.

Slidell v. *Grandjean*, 111 U. S. 412, 28 L. Ed. 321, 4 Sup. Ct. Rep. 475.

State ex inf. v. *Light and Development Company of St. Louis*, 246 Mo. 618, 152 S. W. 67.

State ex inf. v. *Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185; 98 S. W. 539.

Capital City Light and Fuel Company v. *City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866.

Russell v. *Sebastian*, 233 U. S. 195, 58 L. Ed. 912, 34 Sup. Ct. Rep. 517.

State ex rel. Kansas City v. *East Fifth Street Railway Company*, 140 Mo. 539, 41 S. W. 955.

Gretna v. *Bailey*, 141 La. 625, 75 So. 491.

Nelson v. *Garland*, 123 Pa. Super. 257, 187 Atl. 316.

Muhlker v. *New York and Harlem Railroad Company*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522.

Chicago, B. & Q. R. Co. v. *City of Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.

Raymond v. *Chicago Union T. Company*, 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.

Betts v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. Rep. 1252.

Wright v. *Milwaukee Electric Company*, 95 Wisc. 29, 69 N. W. 791, 60 Am. St. Rep. 74.

Los Angeles R. Company v. *City of Los Angeles*, 52 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269.

VI.

Argument.

A.

The Respondent herein filed an injunction suit in the United States District Court several years ago to enjoin the City of Trenton from building a municipal electric generating and distribution plant. The City of Trenton defended that action alleging the invalidity of the Jones Franchise. This contention was sustained by the United States District Court and the injunction proceeding dismissed (R. 131). The United States Circuit Court of Appeals, Eighth Circuit, affirmed the judgment of the District Court (R. 157). The United States Circuit Court of Appeals closed its opinion (R. 164) stating:

> "We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed."

This statement by the United States Circuit Court of Appeals was so worded as to reflect the ultimate judgment and decision of that Court. When fairly interpreted it can only mean that the decree was right for the reason stated in the decree of the District Court and not alone for the reason stated by the United States Circuit Court of Appeals in its opinion. The terminology used and the location of the comma after the word "stated" connects the phrase "for the reasons stated" directly with the "decree" of the District Court. Petitioner's construction of the Circuit Court of Appeals' opinion is consistent with Respondent's former position, as Respondent filed a motion to modify opinion (R. 168) stating:

> "This court on appeal has held that whether the appellant had a franchise or not it had a right to

maintain the action, but the opinion of this court affirms the decree of the district court.

"A controversy still exists between the appellant and the City of Trenton concerning the validity of its franchise, and the said city has notified the appellant that it expects to institute legal action to oust it from said city on account of the alleged fact that appellant's franchise is invalid.

"Under the opinion there is room for a contention by the respondent in subsequent actions that by the affirmance of the decree of the district court the decision of the district court that the appellant's franchise is invalid would be *res judicata* between the parties. An expression to that effect is to be found in the opinion of this court in *Simmonds* v. *Norwich Union Indemnity Company*, 73 F. 2d 412, l. c. 416, and in the case of *Russell et al.* v. *Russell*, 134 Fed. 840, and *Oglesby* v. *Attroll et al.*, 20 Fed. 570."

The Circuit Court of Appeals refused to modify its opinion in any respect (Abs. 169-170), thus clearly indicating the correctness of Petitioner's construction of that opinion. Respondent herein should not be permitted to change its position in respect to this matter. Petitioner earnestly asserts that the issue of the validity of the Jones Franchise was finally disposed of in the litigation in the Federal Courts. In the case of *Simmonds* v. *Norwich Union Indemnity Co.*, 73 F. 2d 412, 416, citing the case of *Russell* v. *Russell*, 134 Fed. 840, the United States Circuit Court of Appeals, Eighth Circuit, stated:

"A question expressly determined by a court of equity, whose decree is affirmed on appeal, is *res judicata* between the parties, although such question was not considered by the appellate court, whose affirmance was based on other grounds."

In the case of *Southern Pacific Railway Co.* v. *U. S.*, 168 U. S. 1, 48, 42 L. Ed. 355, 377, 18 Sup. Ct. Rep. 18, 27, stated:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In the case of *Baker* v. *Cummings*, 181 U. S. 117, 124, 45 L. Ed. 776, 780, 21 Sup. Ct. Rep. 578, 581, laid down the following rule:

> "The mandate from this court in that case, which by stipulation of counsel has been included in the record herein, sets forth our decree, which reversed the decree of the court of appeals with costs, and ordered that the cause be remanded to that court with directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. There was added the usual formula directing that such further proceedings be had in the cause in conformity with the opinion and decree of this court as ought to be had, etc. The proceedings, however, which were thus directed to be taken, were simply to reverse the judgment of the lower court and to dismiss the bill. It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. *Walden* v. *Bodley*, 14 Pet. 156, 161, 10 L. Ed. 398, 400; *Hughes* v. *United States*, 4 Wall. 232, 237, 18 L. Ed. 303, 305; *Durant* v. *Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *Bigelow* v. *Winsor*, 1 Gray. 299, 301; Coop. Eq. Pl. 270; 1 Herman on Estoppel, Sections 151, 152."

It cannot be successfully argued that there was any condition or contingency set forth by the Circuit Court of Appeals in its order of dismissal of the cause between the parties of this proceeding. It is a clear specific dismissal of their cause of action without a saving clause of any kind or character.

Petitioner respectfully submits that the judgments of the Federal Courts holding the Jones Franchise invalid were binding upon the Supreme Court of Missouri under Section 1, Article IV, of the Constitution of the United States it being recognized that the judgment of the Federal Court is a judgment of a State Court within the meaning of this constitutional provision. 15 Ruling Case Law 927, Section 405.

B.

The decision of the Supreme Court of Missouri impairs the obligation of Petitioner's contract with Respondent, in violation of Section 10, Article I, of the Constitution of the United States. The State of Missouri by the enactment of what is now Section 645, Revised Statutes of Missouri, 1939, adopted the common law as of the year 1607 and that law became a part and parcel of each contract which it affected. Under the common law, franchise agreements were strictly construed against the grantee. In Blackstone, Part II, page 347, we find:

> "A grant made by the King, at the suit of the grantee shall be taken most beneficially for the King and against the party * * * but the King's grant shall not inure to any other intent than that which is precisely expressed in the grant."

This principle has been recognized and applies in many early English cases. One of the more frequently quoted cases being that of *Stourbridge Canal Company* v.

Wheeley, 2 Barnewal and Adolphus 791, 793, 109 Eng. Reports, full reprint, 1336, 1337, wherein the following will be found:

> "The canal having been made under the provisions of an act of Parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now firmly established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act. This rule is laid down in distinct terms by the Court in the case of The Hull Dock Company (*The Dock Company of Kingston on Hull* v. *La Marche*, 8 B. & C. 51) where some previous authorities are cited; and it was also acted upon in the case of the *Leeds & Liverpool Canal Company* v. *Hustler* (1 B. & C. 424). Adopting this rule we are to decide whether a right to demand for the use of this part of the canal, is clearly an ambiguity given to the plaintiff's by this Act of Parliament; and whether it is not." * * *
>
> "But the clause in question is capable of two constructions; one, that those persons who pass through the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favor of the company, the latter is in favor of the public and against the company (796), and is therefore, according to the rule above laid down, the one which ought to be adopted."

This common law rule adopted pursuant to the above Missouri statute has been recognized and applied time and

again by the Appellate Courts of Missouri. In the case of *St. Louis Gas Light Company* v. *St. Louis Gas, Fuel and Power Company,* 16 Mo. App. 52, 76, a case decided two years before the granting of the Jones franchise, it is stated:

> "An ordinance is shown (number 11,358) adopted by the municipal assembly of the City of St. Louis, whereby the defendant has acquired 'the right and privilege of laying pipe, with all necessary and proper attachments, connections and fixtures, below the surface of any of the public streets, alleys and highways within the corporate limits of the City of St. Louis, for the purpose of heating public and private buildings,' etc. This gives no more authority to lay pipe for the purpose of lighting than for the purpose of conveying water or wine. All such grants out of the State's prerogatives must be strictly construed and nothing may be added by implication."

Later in the case of *Carroll* v. *Campbell,* 108 Mo. 550, 559, 17 S. W. 884, 886, the Supreme Court of Missouri stated:

> "But, while it was competent for the legislature to grant an exclusive privilege of this kind, it was a canon of construction that a grant of such a nature was construed most strongly against the grantee and in favor of the public, and, unless the legislature made the grant exclusive in the charter itself, it would never be held to be so. 'It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.' "

This general statement as to the existing laws was affirmed in many later cases of our Appellate Courts. *State ex rel. Laclede Gas Light Company* v. *Murphy*, 130 Mo. 10, 24, 25, 31 S. W. 594, 598, affirmed 170 U. S. 78, 42 L. Ed. 955, 18 Sup. Ct. Rep. 505. The Court cited the decision of this Court in the case of *Fanning* v. *Gregoire*, 16 How. 524, 14 L. Ed. 1043. See the still later case of *Memphis Electric Light, Heat and Power Co.* v. *City of Memphis*, 271 Mo. 488, 492, 493, 196 S. W. 1113, 1114.

From the foregoing citations and decisions, to say nothing of the many decisions of this Court, it is clear and certain that the common law and the law of Missouri provides that all franchise agreements are to be strictly construed in favor of the State and against the grantee, that nothing passes by implication and that any doubt as to meaning is to be resolved in favor of the State. There is no need for the citation of authority that the established law becomes a part of every public contract and agreement and such contract must be enforced in the light of such law. Applying this law to the franchise agreement in the instant case becomes our next consideration.

In the granting section of the franchise, Section 1 (R. 301), it is provided that the City of Trenton grants to C. D. Jones and associates "the privilege of erecting gas and electric light works or either of them." In Section 4 of the franchise ordinance (R. 302, 303), authorizing the construction of the plants, it is again provided that the grantee "is hereby authorized to construct and maintain gas and electric light works or either of them * * * and to carry on the business of manufacturing gas and electricity or either of them." The addition of the words "or either of them" in the granting section of the franchise clearly indicates that the grantee had three options under the ordinance.

If this is not true, then why were the words "or either of them" used? First, the grantee might build and operate an electric light and gas works. Both of these utilities might have been erected and operated under the first words of the Sections granting the privilege to erect and operate "a gas and electric light works." Under this grant, the holder had the privilege of proceeding without delay to build both a gas plant and an electric plant and by so doing, every reasonable intendment of the franchise would have been met and the grantee would have been in the position of and would have been properly exercising the rights and privileges of erecting, maintaining and operating a gas plant and an electric plant. Second, the grantee had the alternative of constructing and operating a gas plant. This he was clearly privileged to do under the alternative wording of the ordinance authorizing the erection of "either of them" referring to and meaning either a gas plant or an electric plant. Identically, the grantee had a third alternative, which was the construction and operation of an electric plant.

Thus we see that this franchise ordinance was granted in the alternative, there being three courses of action open to the grantee. The grantee exercised the right and privilege possessed by him to do one of the three things provided for in the ordinance. He made his selection, proceeding with the erection and operation of a gas plant. By this action, the grantee completely assumed and exercised the rights and privileges granted under the franchise. The power and authority which the franchise encompassed was by that action completely exercised and exhausted. There remained no rights or privileges not being used and exercised by the grantee.

The franchise ordinance in this case is clearly susceptible of this construction and under the aforemen-

tioned law such construction is required. This case is analogous to the case of *Blair* v. *City of Chicago*, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427, wherein this Court had before it legislation and franchises, which, when read together, were equally susceptible of two constructions. First, that the privileges were granted for a peiod of 25 years, and second, that the privileges had been extended to a total of 99 years. This Court stated (U. S. 471, L. Ed. 830, Sup. Ct. Rep. 444, 445):

> "A construction can be given it which would extend all the contracts with the city for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the Governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this act upon one construction or the other. It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them and submitted to the Legislature with a view to obtaining from such body the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed."

The situation presented in the instant case is remarkably similar to the facts in the Blair case. Here is an ordinance which is clearly susceptible to the construction advanced by the Petitioner; only by the most liberal

construction in favor of the grantee can Petitioner's position be denied. Petitioner's construction tends to protect and preserve the interest of the City and of the people as against the interest of the grantee, who, as stated by this Court in several cases, may be presumed to have drafted the very instrument under which is being claimed such broad and comprehensive privileges. See *Slidell* v. *Grandjean*, 111 U. S. 412, 438, 28 L. Ed. 321, 330, 4 Sup. Ct. Rep. 475, 487. As opposed to this construction, consider the construction given to the ordinance by the decision of the Supreme Court of Missouri. It is only through the most liberal construction of the franchise ordinance in favor of the grantee, ignoring Section 645, Revised Statutes of Missouri, 1939, that that decision can be sustained. Not only does that construction entirely ignore the principle of strict construction clearly applicable to the case, but it is diametrically opposed to other valid legal principles applicable to this case. The decision ignores entirely the established rule that *service to the public* is of the essence of a franchise agreement. *State ex inf.* v. *Light & Development Co. of St. Louis*, 246 Mo. 618, 640, 152 S. W. 67, 71.

The decision of the Supreme Court of Missouri presumes to validate a franchise agreement which would permit the grantee to retain the franchise right without exercising it for five or ten or, as in this case, twenty-four years, or possibly in another case fifty years, without the grantee of the franchise, during any of such periods, furnishing the facilities and services contemplated by the agreement. Franchises can only be valid when granted under the agreement at least implied or tacit, that the franchise granted will be used. It is only upon such implied condition that the City has the right and authority to grant the use of the streets. *Light and Development Company case, supra. State ex inf.* v. *Delmar Jockey*

Club, 220 Mo. 34, 92 S. W. 185, 98 S. W. 539. Thus the Supreme Court of Missouri by its decision herein has determined that the Jones Franchise was intentionally drafted so that the utility could furnish electric service to the city and to its inhabitants at any time or never. This necessarily follows from the holding of the Court that the erection of the gas plant satisfied the conditions of the ordinance. Therefore the city could not compel the company to erect and operate an electric plant or take any action against the grantee to obtain electric service for the city and its inhabitants. Under all fundamental law applicable to franchises, the purported franchise, as construed by the Supreme Court of Missouri in the instant case, is absolutely void. A city council cannot grant a franchise to a grantee without any contemplation that the service to be rendered would be furnished within a reasonable time. A community cannot be bound by a franchise in which there is no obligation on the part of the grantee to furnish the service or facility. Under the authorities heretofore pointed out, authorities in the State of Missouri, to say nothing of the many decisions of this Court on this subject, no municipal authority has the power to bind the city to any grantee, giving such a right and privilege.

The Supreme Court of Missouri seeks to validate its action upon the theory that the construction and operation of the gas works satisfied the conditions contained in the ordinance and thereby validated and furnished the consideration for the electric franchise. The court relies on the wording of Section 6 (R. 304) of the franchise ordinance which reads "This ordinance is conditioned on the building * * * (of a) gas or electric light works * * * which said gas or electric light works shall be commenced on or before August 1, 1886 * * *." Considered alone,

Section 6 might be construed as the Court has done. It is elementary, however, that all parts of the franchise ordinance must be considered together, and construed as a whole. The Court's construction is not only a liberal construction of Section 6, but does violence to Sections 1 and 4. It is quite clear that a reasonable interpretation of Section 6 in the light of the entire ordinance was meant and intended to cover the three alternatives which were provided for in Sections 1 and 4 of the ordinance. But Section 6, recognizing that the grantee might not choose to build both a gas and electric light works, could only be worded "gas *or* electric light works" for if the conjunctive had been used, it might have been strictly construed to mean that the building of a gas plant would not satisfy the condition of the ordinance even so far as the gas franchise were concerned. Therefore, Section 6 had to be worded "gas or electric light works" to provide for the alternative rights of the grantee. The conditions were, therefore, alternative. The privilege granted under the franchise to erect a gas works was conditioned upon the building being completed before December 1, 1886, or, if the grantee selected the option of building an electric light works, that construction must be completed on or before December 1, 1886, and necessarily, of course, if the grantee expected to exercise the privilege of building and operating both gas and electric works, the construction of both works would have to be completed before December 1, 1886. Such a construction is the only construction that can be given to this section consistent with the provisions of Sections 1 and 4 of the franchise ordinance and certainly the only construction which is permissible under the established law of strict construction of such contracts.

From a fair reading of the franchise ordinance in the instant case it cannot be said that the city granted to the Respondent the right and privilege to construct and oper-

ate an electric plant at any time in the indefinable future. Such a construction gives to the grantee a valuable right to be exercised at any time without any consideration whatsoever. The consideration for the right to erect and operate a gas plant was the privilege of serving the city and the people thereof with gas light, the consideration for the right to erect and operate an electric light works was the privilege of serving the city and the people thereof with electricity. These two rights are severable and separate. This point has been conclusively determined by the decision of this Court in the case of *Capital City Light and Fuel Company* v. *City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866. Apparently the franchise ordinance in that case was drafted by the same hands that drew the ordinance in the instant case. In the cited case, the franchise ordinance authorized the company to construct "gas and electric light works in the city for the purpose declared in its charter" and that it should "have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same and to erect such lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in said city * * * and run wires thereto along the streets of said city * * *." Thus, by its terms, the franchise ordinance did not so clearly set forth the alternative rights of the grantee as does the ordinance in the instant case, yet this Court in construing the franchise determined that they were two separate and distinct privileges, l. c.

> "The ordinance adopted by the city council has reference to two absolutely separate and distinct privileges although they are contained in one and the same ordinance. One privilege is to use the streets of the city for the purpose of laying down gas mains and other pipes, to distribute gas throughout the city, and to supply consumers with that article. The other is

the right to the use of the streets of the city for the purpose of erecting poles and other things to convey electricity necessary for the lighting purposes. These two privileges are as absolutely separate and distinct as is a privilege to convey by railroad from that by steamboat or by stagecoach. It is seen by the terms of the ordinance that it was not contemplated that these different privileges and plants should be availed of and constructed at the same time, but, on the contrary, the gas plant was to be constructed at once while the obligation to construct the other was left in abeyance and not to be entered upon until consumers enough could be secured to pay 8 per centum per annum on the additional capital required to purchase the machinery for and put in practical operation the lighting by electricity. The two grants might, therefore, have been in two separate ordinances and given to separate persons, firms, or corporations. The operation of one would not interfere with that of the other, except, perhaps, on a question of financial success, but so far as the character of the two grants is concerned, each one is wholly separate and distinct from the other."

From a consideration of all of the sections of this ordinance, it is quite clear that the various grants alternatively provided therein are separable and that the various sections of the ordinance have been so drafted so as to be applicable to any alternative which the grantee might select and proceed with. After what must be presumed full consideration, the Respondent selected the alternative it desired to proceed with. Why it did so is not a matter of present concern, but it is unrealistic to say that there was no substantial anticipation on the part of the parties that an electric light plant was to be built. Certainly that is contrary to reason, for many localities in Missouri had the benefits and advantages of electric plants in 1886, the year this franchise was granted and in fact within four years thereafter other individuals proceeded with the erection

and operation of an electric plant at Trenton. The people of the City of Trenton cannot be assumed to have gratuitously granted rights and privileges included in a franchise, without anticipating a corresponding obligation on the part of the grantee to supply the public service which the franchise contemplated. Rather the franchise must be construed as intending and separately reflecting the intent to grant alternative privileges, the privileges accepted being promptly followed through by the supplying of the services and facilities.

Had the Supreme Court of Missouri recognized the rule of strict construction, it would have arrived at the same conclusion in respect to the franchise in the instant case that was arrived at by this Court in the *Tallahassee case, supra*. Again, only by a most liberal construction of the franchise agreement could the Supreme Court of Missouri have failed to have held that the provisions of the Jones Franchise ordinance were separable and to have held that there was no valid existing franchise for the generating and distribution of electricity.

In another respect, the Supreme Court of Missouri failed to strictly construe the Jones Franchise ordinance. Section 7 (R. 304) is clearly susceptible of a construction (regardless of the construction given to Sections 1 and 4 of the franchise ordinance) that any rights under the Jones Franchise to generate and distribute electricity had been forfeited. This was the determination made by the Special Commissioner appointed by the Supreme Court to hear and determine the case. The Special Commissioner recognized the rule of strict construction and that the franchise ordinance prepared by attorneys representing the utility should be carefully scrutinized and any doubt resolved in favor of the public and against the utility, as was stated by this Court in the case of *Russell* v.

Sebastian, 233 U. S. 195, 205, 58 L. Ed., 912, 921, 34 Sup. Ct. Rep. 517, 520:

> "In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that ambiguities are to be resolved against the grantee. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546, 549, 9 L. Ed. 773, 823, 824; *Sliddell* v. *Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321, 329, 4 Sup. Ct. Rep. 475; *Detroit Citizens' Street R. Co.* v. *Detroit R. Co.*, 171 U. S. 48, 54, 43 L. Ed. 67, 71, 18 Sup. Ct. Rep. 732; *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 34, 50 L. Ed. 359, 26 Sup. Ct. Rep. 224; *Blair* v. *Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801, 830, 26 Sup. Ct. Rep. 427. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties, and that it serves to frustrate efforts through the skillful use of words to accomplish purposes which are not apparent upon the face of the enactment. *Dubuque & P. R. Co.* v. *Litchfield*, 23 How. 66, 88, 16 L. Ed. 500, 509; *Sliddell* v. *Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321, 329, 4 Sup. Ct. Rep. 475; *Blair* v. *Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801, 830, 26 Sup. Ct. Rep. 427."

It is apparent from the record that the scheme of the predecessors of this Respondent was to claim rights and privileges under the Jones Franchise, thereby obviating the necessity of securing new franchises at each 20 year interval, as required by the statutes in effect at the time the Bailey Franchise expired. The object of the power company was apparent. In 1893, the City of Trenton surrendered its Special Charter (R. 506) and was thereafter operating under the General Statutes applicable to cities of the third class. In 1893, an act was passed limiting any franchise granted by such a city to twenty years. Sec.

5846, R. S. of Mo., 1899. Therefore, any renewal of the Bailey Franchise could only be for a term of twenty years. The Special Commissioner found that the power company, during the years following the expiration of the Bailey Franchise, followed a plan to bind the city under the forfeited Jones Franchise (R. 1083, 1084, 1090, 1091). The evidence before the Commissioner shows that the predecessor of the Respondent power company appeared before the City Council of the City of Trenton, after the Bailey Franchise expired, with ordinances prepared not be attorneys for the city but by attorneys for the power company (R. 675-680). The ordinances referred to were in relation to street lighting contracts and by said ordinances the city council mentioned and acknowledged the Jones Franchise and the Bailey Franchise. In support of the position of the City of Trenton that the Jones Franchise conferred no rights upon Respondent to operate an electric plant in Trenton and that even though such rights might have been conferred at the time of the grant, that they had been forfeited by reason of 24 years or more of non-user, and in answer to Respondent that the city had acknowledged by the street lighting ordinances the validity of the Jones Franchise, the Special Commissioner said (R. 1090):

"The fact that the Jones Franchise had been forfeited under the provisions of Section 7 of the Jones Franchise ordinance by at least 11 years' nonuser does not appear to have ever been brought to the Council's attention. No minutes of the council's meetings relate to the fact that such question was presented."

> "In this connection it may be considered that the Power Company, a corporation, had perpetual existence and that its officers, attorneys and agents were experts in corporation practices and the law per-

taining to its franchises. On the other hand the membership of the City Council and the City Officers were probably changed biennially. There is nothing of record to show that the mayor and members of the Council were experts of any kind or that any were attorneys. No question as to the validity of the Jones Franchise appears to have been brought to the attention of the Council until just prior to the passage of the ouster ordinance in 1938. Under the foregoing facts it can readily be inferred that the several city councils relying upon the representation of the power company aforesaid that the Jones Franchise was valid and perpetual, and not having had its invalidity brought to their attention, should, during their brief tenure of office, rely upon said representations and adopt the *status quo*. No question concerning the validity of the Jones Franchise appears to have been raised by the City in the several proceedings before the Public Service Commission shown of record. Every act of the City, from 1900 to 1938, appears to have been done without knowledge that the Jones Franchise was forfeited and void. The question of the validity of the Jones Franchise was an involved legal question beyond the capacity of laymen to resolve. It first appears to have been resolved favorably to the city by the opinion of Judge Otis in the injunction action. This favorable decision appears to have been brought to the attention of the City Council and followed by the passage of the ouster ordinance, and, upon non-compliance therewith, by the institution of the present action. Long delay after knowledge does not, therefore, appear."

The Special Commissioner, continued his findings in his report to the Supreme Court of Missouri, saying (R. 1078):

"Nothing appears in the testimony to show that the Trenton Gas and Electric Company ever made any attempt to operate an electric plant until it ac-

quired the plant of the Trenton-Thompson-Houston Company eleven years after the granting of the Jones Franchise, and nothing appears in the testimony to show any objection in its part to the granting of the Thompson-Houston franchise or the construction of its electric plant. While it is true that it operated its gas plant continously during this eleven year period, it is also true that it stood idly by and permitted the Trenton-Thompson-Houston Company to receive its franchise, make its investment, construct its plant, occupy the streets and serve the people of the town with electricity for a period of seven years before purchasing same. I am of the opinion that under the above facts and under the terms of Section 7 of the Jones Franchise above quoted there was a complete forfeiture of the electric light provisions of the Jones Franchise which became effective without the necessity of court action. By accepting the Jones Franchise, including Section 7, the Trenton Gas & Electric Company agreed to be bound by the self-determining provisions of Section 7, and its failure for at least eleven years, to exercise the power granted to construct an electric light plant must be held to be a complete forfeiture by abandonment and nonuser of their right so to do."

Further evidence is found in the Commissioner's report to the Court of the scheme of the Power Company to revive the Jones Franchise when he said:

"No attempt was made to secure a new franchise upon repeal of the Bailey Franchise, the Power Company apparently electing to take its chances that it could convince the City that the Jones Franchise was still valid or that the City would not wake up to the fact that the Jones Franchise was forfeited. The Council appears to have been ignorant of the fact that the Jones Electric Franchise was forfeited and no longer valid. The law concerning forfeiture of franchises by self-executing provisions of the Franchise

Ordinance was established at that time and must be presumed to have been known to the Power Company and its attorneys. It cannot be assumed that the Council had knowledge of the forfeiture of the Jones Franchise, and notwithstanding such knowledge, intended, by the passage of the lighting ordinance containing the quoted clause, to disregard the public policy of the state respecting perpetual franchises, or that it intended, by this Ordinance, to revivify the corpse of the Jones Electric Franchise and thereby saddle a perpetual franchise on the City. To assume so would be to assume that the members of the council deliberately intended to violate their oaths of office. The presumption of right action by officials should prevail. I am of the opinion that the preparation and presentation of this Ordinance to the Council by the Power Company, through its attorneys, was part of a studied plan to revive the Jones Franchise, with its perpetual term, and thereby avoid the uncertainty and expense of securing new franchises from time to time after the expiration of the Bailey Franchise. Therefore there could have been no misreliance by the Power Company thereon, nor damage arising therefor."

Also at 1084:

"As to the contract ordinances passed after 1900 I am of the opinion that they were a mere continuation of the plan of the Power Company to revive the Jones Franchise and procure some action on the part of the City Council recognizing the validity of the Jones Franchise, and I conclude that they do not estop the City."

Also at 1094:

"I have concluded heretofore that the passage of the five street lighting ordinances attempting to revive the forfeited Jones Franchise occurred long after the forfeiture was effective, and that the City Council

> at the time of passage of these ordinances was unaware of the fact that the forfeiture had occurred."

From the quoted statements above, it is clear that the Special Commissioner found that under the self-operating forfeiture clause of the franchise ordinance, the Respondent had no right whatsoever under the franchise agreement. In spite of the fact that the Supreme Court of Missouri held in the case of *State ex rel. Kansas City* v. *East Fifth Street Railway Company*, 140 Mo. 539, 550, 41 S. W. 955, 957, that:

> "The sovereign power of the State to proceed against defendant company by quo warranto for forfeiture of its franchise even at the relation of the city could not be contracted away or in any way abridged by the city."

in the instant case, it ignored the above finding of its Commissioner and permitted Respondent to enjoy the fruits of the franchise, which, under the decisions of that Court, was clearly forfeited. In the franchise in the *East Fifth Street Railway Company Case, supra*, it was provided that a failure to assert a forfeiture within six months after the cause occurred should constitute a waiver of the forfeiture. In holding that such provision was void, the Court stated, (Mo.) 556 S. W. 959:

> "If the city had the right to provide by ordinance against the forfeiture of the franchise of defendant on account of the nonuse of its tracks for a period of six months, it had the same right to provide against its forfeiture for an indefinite period and thereby convert the use, which was and could only be public, to a private use."

There was an absolute nonuser of any claimed electric franchise under the Jones Franchise ordinance for a period of 24 years and the fact that electric generating and

distribution system was later operated under the claimed privileges of the Jones Franchise up until the time the action in quo warranto was brought, makes the Respondent but a licensee.

Petitioner respectfully represents to this Court that in every particular, wherein a strict construction of the franchise ordinance could only result in a determination in Petitioner's favor, the Supreme Court of Missouri, disregarding this principle and moving with a most liberal construction of the franchise ordinance, has entirely distorted the franchise ordinance as it should be judged by the established law. When the instant case is compared with other decisions of the Supreme Court of Missouri, wherein, on the basis of strict construction, there has been a refusal to extend or to recognize franchise rights claimed by a grantee it will be found that this is a most flagrant case. Likewise, when the facts in this case are compared with facts in cases decided by this Court, it is found that franchise rights have been denied grantees under much more questionable circumstances. This common law rule of strict construction adopted in Missouri by the enactment of Section 645, Revised Statutes of Missouri, 1939, and applied time and again in other cases by the Supreme Court of Missouri, clearly became a part and parcel of Petitioner's contract with Respondent and to totally disregard this determining factor in the instant case is to deprive Petitioner of its property without due process of law. It cannot be doubted that a franchise right is property. Decisions in every jurisdiction recognizes this to be the case. *Carroll* v. *Campbell*, 108 Mo. 558, *supra*. That, under the proper circumstances, a municipal corporation is within the protection of the Constitution has been recognized. *Gretna* v. *Bailey*, 141 La. 625, 75 So. 491. *Nelson* v. *Garland*, 123 Pa. Super. 257, 187 Atl. 316.

Petitioner respectfully urges that the principle announced in the case of *Muhlker* v. *New York & Harlem Railroad Co.*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522, is applicable to the instant case. In decisions involving other parties and property, the New York Courts had determined that the deed to private property carried with it the right of easement of air and light. This established law had been determined time and time again in exhaustive and carefully considered opinions. The Supreme Court of the State of New York undertook to change this rule of law and to determine that an elevated railway company, building its line in front of abutting property was not liable for damages to the property owners resulting from the cutting off of light and air. This Court in that case, U. S. 571, Law Ed. 878, Sup. Ct. Rep. 528, stated:

> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the Courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States, *and we determine for ourselves the existence and extent of such contract.* This is a truism; and where there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of the rights under it."

In this connection it must be recalled by this Court in reviewing the instant case that the common law of England had been adopted by legislative enactment in the State of Missouri and two years before the making of the franchise contract in question, the appropriate Courts of Missouri had ruled upon the construction to be given such contracts. *St. Louis Gas Light Company* v. *St. Louis*

Gas, Fuel and Power Company, 16 Mo. App. 52. Thus, at the time that the rights of the parties under the franchise agreement were to be measured and determined, the existing law must be read into the contract, becoming a part of it and a subsequent decision of the Courts, ignoring that factor cannot deprive Petitioner of its rights without doing violence to the Federal Constitution.

Likewise, the decision in the instant case, and on the basis of the same authorities, violates the due process clause of the Federal Constitution. It cannot be denied but that the due process clause, the V and XIV Amendments of the Constitution, applies to judicial action, as well as to legislative and executive action. In the case of *Chicago, B. & Q. R. Co.* v. *City of Chicago,* 166 U. S. 226, 233, 41 L. Ed. 979, 983, 17 Sup. Ct. Rep. 581, 583, the following statement is to be found:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' "

The fact that Petitioner herein has had an opportunity to present his views is no guarantee that the result attained cannot constitute a violation of the due process clause. As stated by this Court in that case (U. S. 234. L. Ed. 984, Sup. Ct. Rep. 584).

"It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *U. S.* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468, 11 Sup. Ct. Rep. 577. But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' *Davison* v. *New Orleans*, 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

So in the instant case it is clear that the result which has been obtained in failing to apply Statutes and long standing rules of law to the case as bar is not corrected by the mere fact that Relator has been heard so as to constitute such proceeding due process of law. The result attained in its totality is so clearly and patently unfair

and unlawful that even though established procedure, which should normally result in a fair and just decision, were followed, it is clear that due process of law has not been afforded Petitioner. As stated by this Court in the above cited case, U. S. 236, Law Ed. 984, Sup. Ct. Rep. 585:

> "Notice to the owner to appear in some judicial tribunal and show cause why his property should not be taken for public use without compensation would be a mockery of justice. Due process of Law, as applied to judicial proceedings instituted for the taking of private property for public means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And in conclusion (U. S. 241, L. Ed. 986, Sup. Ct. Rep. 586):

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

In the case of *Raymond* v. *Chicago Union T. Co.*, 207 U. S. 20, 36, 52 L. Ed. 78, 87, 28 Sup. Ct. Rep. 7, 12, the Court had before it the action of a State Board of Equalization in levying tax assessments pursuant to a writ of mandamus issued by the State Court. The State Board

of Equalization acted pursuant to the final order and judgment of the State Court. This Court held notwithstanding that such action violated the due process clause of the Federal Constitution and stated:

> "The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year."

In the above case, although the State Board of Equalization acted on the mandate of a state Court, it was clear that it had failed to equalize the assessments as required by the statute. Likewise, it is equally clear that the Supreme Court of Missouri has ignored the mandate of Section 645, Revised Statutes of Missouri, 1939, adopting the common law in the State of Missouri.

Petitioner respectfully suggests that this case is a most exceptional one, one in which the Supreme Court of Missouri has with apparent impunity disregarded the statute and established law of the State in the decision which has been rendered herein which is of great and lasting importance to many, many people. It is only through an absolute disregard of the established law of Missouri that the decision in this case could be reached. Petitioner respectfully submits that when a Court decision so clearly and unequivocally ignores and disregards the established law, that such litigant has been denied the due process of law as guaranteed him by the Constitution of the United States.

There are no rigid rules which can be applied to the application of the due process clause of the Federal Con-

stitution. It is a fluid and leavening provision to be applied to the facts in each case. It cannot be limited by any fixed concept. In the case of *Betts* v. *Brady*, 316 U. S. 455, 462, 86 L. Ed. 1595, 1601, 1602, 62 Sup. Ct. Rep. 1252, 1256, this Court has stated:

> "Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against State action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

As in that case, so in the instant case. The application of the constitutional provision is to be made on the basis of a fair appraisal of the totality of facts in a given case. Certainly the instant case is a denial of fundamental fairness, shocking to the universal sense of justice. The instant case is not to be confused with those decisions of this Court wherein a review by this Court has been sought of a decision of the Supreme Court of a State wherein, for the first time a State Court has passed upon and established the law in respect to a given set of circumstances. Were this the case, we would not presume to present it to this Court.

We wish to lastly argue another patent refusal of the Supreme Court of Missouri to apply the established rule of strict construction pertinent to the issues in this case.

The Supreme Court of Missouri in its decision first relies upon the provisions of Section 6 of Article VII of the charter of the Town of Trenton (R. 529), authorizing the City Council to provide for the lighting of the streets, avenues and alleys as being a sufficient delegation of legislative authority to empower Petitioner to enter into the franchise agreement in this case. A most liberal construction of this provision cannot authorize the granting of an electric franchise under which there is no provision of any kind or character for the lighting of the streets, avenues or alleys with electricity. Section 5 of the Jones Franchise specifically provides for the lighting of the streets by gas (R. 203). How it is possible to construe this provision as authorizing the city to enter into an electric franchise, which has no relation or bearing to the lighting of the streets, avenues or alleys is beyond comprehension. The sole authority cited by the Supreme Court of Missouri is the case of *State ex rel. Underground Service Co.* v. *Murphy*, 134 Mo. 548, 31 S. W. 784. In this case, the Supreme Court of Missouri considered the charter of the City of St. Louis which provided that the city had the power to regulate "the public use of the streets." The public use of the streets might well be construed to cover every reasonable use to which the streets could be put in the public interest. It might therefore contemplate the use of the public streets for the erection of poles and the stringing of wires to supply the inhabitants of the city and the city itself with electric energy. The charter of the City of Trenton however makes no reference to the public use of the streets but simply authorizes appropri-

ate action by the council to provide *for the lighting of the streets.* A franchise ordinance wholly silent as to the lighting of the streets cannot be sustained as within the legislative grant of authority.

As a secondary matter, the Court based its decision as to the sufficiency of the charter of the Town of Trenton to authorize the granting of a perpetual electric franchise on the provisions of Section 13, Article III of the charter (R. 519) authorizing the council to pass ordinances expedient for the peace, good government, health and welfare of the town. A review of the legislative history of grants of authority to municipalities of Missouri clearly indicates that there was no such intention on the part of the Legislature that such a provision should encompass power to grant an electric franchise. This is certain from a review of the pertinent statutes of that day. Sections 951 and 952, Revised Statutes of Missouri, 1879, authorized cities of the third class to enter into franchises for gas and water. No authority was given for the making of an electric franchise. At the same time, these two statutes provided only for franchises for gas and water, there was a general statute, Section 1526, Revised Statutes of Missouri, 1889, which authorized cities of the third class to "enact and make all such ordinances by laws, rules and regulations not inconsistent with the laws of the State as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce." In the year 1889, in spite of the provisions of Section 1526, the Legislature amended Sections 951 and 952, Revised Statutes of Missouri, 1879, so as to authorize such cities to enter into electric franchises. Sections 2793 and 2794, Revised Statutes of Missouri, 1889. Such amendment would have been wholly unnecessary if the provisions of Section 1526, Revised

Statutes of Missouri, 1889, were sufficiently comprehensive to authorize the granting of electric franchises.

As is readily seen by a fair comparison, Section 1526 Revised Statutes of Missouri, 1889, was substantially the same as Section 13 of Article III of the special charter of the City of Trenton. The only conclusion which can be reached from this is that the provisions of the special charter of the City of Trenton granted by the same body which in 1889 amended Sections 951 and 952, Revised Statutes of Missouri, 1879, never intended or expected Section 13, Article III of the Charter to authorize the City of Trenton to enter into electric franchises.

We respectfully submit that this is not merely an erroneous interpretation of Missouri law but is further evidence of the whole and total disregard of the Supreme Court of Missouri for the application of established principles of law to Petitioner's case.

Petitioner respectfully submits that the case herein presented is a most exceptional and unusual one. It necessarily calls for and is deserving of careful and thorough consideration. Without question, the constitutional provisions relied upon by Petitioner are sufficient to protect against the improper or, may we say, unlawful acts by any branch or department of the State Government. The regularity of the proceeding, on its face, has no bearing upon the validity of the result when tested under the constitutional provisions. This Court will determine for itself whether or not these constitutional requirements have been met. Respondent's claimed franchise is wholly invalid and ineffectual. Petitioner's constitutional rights are violated by the action of the Supreme Court of Missouri holding it valid. Petitioner was and is clearly entitled to the relief sought in the proceeding in the Supreme Court of Missouri. It is entirely possible that a present member of this Court has, many years ago, had occasion

to examine the franchise here under consideration. It appears from the record (R. 673) that at one time, this Justice was a bond-holder in one of Respondent's predecessor companies, and that he, as has this Petitioner, had difficulty in inducing one of Respondent's predecessors to comply with its contracts. It may well be that he satisfied himself as to the validity of this franchise before becoming the owner of such bond. In such case, we know that this occurred when he was a very young man, with far less experience in the law than he now possesses, possibly he was as young as counsel for Petitioner who prepared this brief, and we hope that he may now review this issue with the wisdom and knowledge that can come only from experience, and find genuine merit in the arguments advanced on behalf of Petitioner.

Respectfully submitted,

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